BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID H. BLAUVELT Claimant	)	
VS.	)	Docket No. 1,023,114
TRANSAM TRUCKING, INC. Self-Insured Respondent	)	

ORDER

Respondent requests review of the December 21, 2005 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for benefits, including temporary total disability benefits and authorized Dr. Thomas Samuelson[1] and Dr. Kimberly Cochran[2] to treat the claimant. Unfortunately, the ALJ's preliminary hearing Order fails to make any specific finding with regard to notice and whether claimant's accidental injury arose out of or in the course of his employment.

While respondent concedes claimant sustained a compensable injury on April 26, 2005, respondent maintains claimant only injured his right knee in the tractor/trailer accident and nothing more.[3] Thus, respondent argues it had no notice of any head injury and, based upon the record as a whole, that his present need for treatment is not attributable his work-related accident. On appeal, respondent also suggests that claimant

[1] As per respondent's direction, Dr. Samuelson was treating claimant's knee injury.

[2] Pursuant to Dr. Samuelson's referral, Dr. Cochran was treating claimant's closed head injury.

[3] There is no dispute that Dr. Samuelson is authorized to treat claimant's knee complaints which are attributable to the April 26, 2005 injury.

has failed to assert a timely written claim as required by K.S.A. 44-520a.[4] Accordingly, respondent maintains the ALJ's preliminary hearing Order should be reversed.

Claimant argues that the ALJ's Order should be affirmed.

The issues to be resolved in this appeal are:

1. Did claimant prove he sustained a neck injury arising out of and in the course of his employment with respondent on April 26, 2005?

2. Did claimant prove he provided appropriate notice as required by K.S.A. 44-520? and

3. Did claimant file a timely written claim as required by K.S.A. 44-520a?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant has worked for respondent for 7 years as a truck driver. In the early morning of April 26, 2005 he was driving down I-40 highway in Alabama when his tractor/trailer jacknifed on the highway. Claimant testified that his trailer hit the door of his cab, causing him to hit his head on the window. His right knee was injured in the accident and he also experienced a "horrible headache".[5]

Claimant reported the incident to Paul Turner, at the employer's office and this fact is confirmed by Mr. Turner. Claimant maintains that he told Mr. Turner not only of his knee pain, but that he had struck his head in the accident. Mr. Turner does not specifically deny this assertion but only affirms, in his affidavit, that claimant mentioned that he had hurt his knee in the accident.

Claimant was brought back to Kansas City and was referred to Dr. Samuelson for treatment for his knee complaints. Claimant testified that he was still having headaches, but does not recall informing the doctor of that complaint as he was more concerned with his right knee at the time. Within a few days claimant noticed his right knee was shaking. He mentioned to the orthopedist who told him it was muscle weakness.[6]

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[4] Respondent's Brief at 4 (filed Jan. 18, 2005).

[5] P.H. Trans. at 6.

[6] *Id.* at 9.

Claimant saw Dr. Katharine Southall on April 29, 2005 for an evaluation. According to Dr. Southall, the claimant had knee pain from a accident while driving his truck. She also noted that claimant denied any injury to his head, neck, arms, shoulders or lower back.[7] Upon examination, claimant was diagnosed with right hamstring and right knee strain. Physical therapy and medication were recommended, and claimant was told to work modified duty of no driving.

Claimant then saw Dr. Charles Smith on May 9, 2005. At that time his chief complaint was pain in the right knee and he was using crutches to ambulate. Dr. Smith diagnosed claimant with medial collateral ligament sprain of the right knee and degenerative joint disease of the right knee, most noted over the medial compartment. Claimant was given a hinged knee brace and scheduled for physical therapy. Claimant was told he could quit using his crutches when he could bear weight on his knee and was given pain medication. He was also restricted from doing any repetitive standing, walking, squatting, or kneeling activities.[8]

On October 5, 2005, claimant was seen by Dr. Kimberly A. Cochran for complaints of a right leg tremor. Dr. Cochran noted the problems claimant was having with his knee. Her office notes reflect that claimant alleged to have hit his head twice during the accident. Claimant was diagnosed with "acute onset of right leg tremor after a motor vehicle accident where he did hit his head . . . It is possible that this patient has sustained a head injury causing a tremor in the right leg vs. spasticity."[9] On November 28, 2005, Dr. Cochran wrote a letter stating that she felt that claimant was suffering from clonus and prescribed Clonazepam which somewhat sedates the claimant, so he was instructed to only do work that did not involve driving.

Respondent first challenges the adequacy of claimant's notice. Respondent concedes notice for a knee injury on April 26, 2005. However, it steadfastly maintains claimant never gave notice of a head injury.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice

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[7] *Id.*, Resp. Ex. A at 3 (Dr. Southall's Apr. 29, 2005 report).

[8] *Id.*, Resp. Ex. A at 5-6 (Dr. Smith's May 9, 2005 report).

[9] *Id.*, Resp. Ex. B at 3 (Dr. Cochran's Oct. 5, 2005 report).

> unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

This statute merely requires notice of "the accident". It does not, nor has it been interpreted to mean that it requires a full accounting of the extent of an employee's injuries. Indeed, the full extent of one's injuries cannot, in many instances, be realized until days or months after the accident.

Respondent was informed of claimant's tractor/trailer accident, and his complaints relative to his knee were, by claimant's testimony, overshadowing his complaints of headaches. Even so, claimant says he told Mr. Turner about hitting his head in the accident. That fact is not disputed by Mr. Turner.

Although the ALJ's Order did not specifically make such a ruling, and ideally he should have, it is nonetheless implicit in his preliminary hearing Order that he found in claimant's favor on this issue as he ultimately awarded benefits. The Board has considered the evidence in this matter and finds the ALJ's implicit finding on the issue of notice should be affirmed.

As for respondent's contention that claimant's head injury did not arise out of and in the course of his employment, that argument is likewise rejected. In awarding medical treatment and temporary total disability benefits, the ALJ again implicitly found that claimant's present complaints of right leg tremors stem from his work-related injury. Although the medical evidence on this issue is, at this point, largely undeveloped, Dr. Cochran has opined that the leg tremors are due to head trauma sustained in the April 26, 2005 accident. And claimant has testified that he struck his head in the April 26, 2005 accident. The only evidence that arguably suggests otherwise is the note from Dr. Samuelson who says another physician, a neurologist who apparently opines the leg tremors are due to "old head trauma".[10] There is no further evidence to clarify which neurologist might hold this opinion and if by "old head trauma" the unknown neurologist means the April 26, 2005 accident or another accident.

[10] *Id.*, Resp. Ex. A. at 10 (Dr. Samuelson's Oct. 10, 2005 office note).

Based upon the evidence developed at this juncture, the Board affirms the ALJ's implicit finding that it is more likely than not that claimant sustained a head injury in the April 26, 2005 accident.

As for respondent's final argument, that claimant failed to file a timely written claim as required by K.S.A. 44-520a, the Board will not consider this issue. At the preliminary hearing, written claim was not made an issue. Issues that are not brought before the ALJ will not be considered on appeal.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.[11]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated December 21, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2006.

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BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Fred Bellemere, III, Attorney for Self-Insured Respondent
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[11] K.S.A. 44-534a(a)(2).